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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

TONY EUGENE FERRARI,

Defendant and Appellant.

C085791

(Super. Ct. Nos.
17FE008294, 15F00878)

Following a jury trial, defendant Tony Eugene Ferrari was convicted of felony unlawful taking or driving of a vehicle worth more than \$950 (Veh. Code, § 10851, subd. (a)) in case No. 17FE008294. The trial court sustained an allegation that defendant suffered a prior conviction for unlawfully driving or taking a vehicle (Pen. Code, § 666.5, subd. (a)),¹ and also found that he had violated his probation in case No. 15F00878. The trial court sentenced defendant to a four-year state prison term.

On appeal, defendant argues that his sentence must be reversed because the trial court incorrectly concluded that he was ineligible for probation, and any forfeiture caused

¹ Undesignated statutory references are to the Penal Code.

by trial counsel's failure to object to the court's erroneous conclusion constituted ineffective assistance. Trial counsel's failure to object did indeed forfeit the claim, thus we review for ineffective assistance. Because we conclude that defendant was prejudiced by the conduct of his trial counsel, we shall remand for resentencing.

BACKGROUND

The Crime

On May 4, 2017, L.D. was leaving work at approximately 3:30 p.m. when she realized she had misplaced the keys to her Toyota 4Runner. L.D. went to where her vehicle was parked, but it was gone. The vehicle was in good condition and worth about \$11,000. She called the police and reported it stolen.

Shortly before 7:00 p.m. that day, the 4Runner was spotted by a Sacramento County Sheriff's sergeant on patrol. The sergeant ran the vehicle's license plate, learned it was reported stolen, and effected a traffic stop. Defendant was the driver and there was a female passenger. The interior of the vehicle was damaged and messy. The dashboard was broken and the stereo was missing. The key was found inside the vehicle, but wires hung from the steering column.

Defendant said he got the 4Runner from his friend Brian around lunchtime. He did not know Brian's last name. He also did not know the vehicle was stolen and said he planned to return it to Brian the next morning. Defendant said Brian told him he could sell the "display," so he sold it to a man named Pete. He sold the 4Runner's stereo, GPS, and screen to Rush, who lived at Pete's house.

Sentencing

The probation report laid out defendant's criminal record, which included two prior felony convictions, eight prior misdemeanor convictions, and defendant's probationary status for one of the felony priors. The report also documented defendant's admission that he had "been abusing methamphetamine for the past 10 years since his divorce." The report correctly noted that defendant was presumptively ineligible for

probation under section 1203, subdivision (e)(4), but it did not analyze whether this was an “unusual case” under California Rules of Court, rule 4.413² or any other standard.

The probation department identified five alleged aggravating circumstances: the crime involved planning, defendant engaged in prior violent conduct indicating a serious danger to society, he had numerous prior adult convictions, he was on formal probation when the crime was committed, and his prior performance on probation was unsatisfactory. (Rule 4.421(a)(8), (b)(1), (b)(2), (b)(4), (b)(5).) The report identified no mitigating circumstances. It recommended an upper term of four years and a concurrent three-year term in case No. 15F00878.

At sentencing, the trial court stated it intended to follow the probation officer’s recommendation. Defense counsel disputed the planning circumstance, as the car theft was accomplished by defendant taking the keys the victim had dropped. The trial court agreed. After the prosecution argued for an additional aggravating circumstance and the parties discussed victim restitution with the court, defense counsel disputed some of the fines and fees in the probation report. The trial court then stated defendant was “ineligible for probation in the case in chief” and imposed a four-year term consisting of an upper term of four years for the vehicle theft in case No. 17FE008294, finding all of the aggravating factors identified in the probation report other than planning. The court also imposed a concurrent three-year term in case No. 15F00878.

After imposing sentence, the trial court offered a few candid thoughts to defendant. The judge told defendant he was charming, likable, presentable, and articulate when “clean,” meaning not using methamphetamine. “[I]f you were to put your mind to it you could probably make your living in a legitimate way. Your problem, quite simply, sir, is drugs. Methamphetamine.” The court further told defendant the comparison to

² All further references to rules are to the California Rules of Court.

when he was on drugs, as shown by the patrol car video, was “striking and shocking.” The court told defendant the reason he looked and felt so good right now was because he was not on methamphetamine, and that there were substance abuse programs for him in prison. Concluding, the court stated to defendant: “I really hope that you take advantage of [the rehab programs] while you are in there If you come out and keep doing the same thing, then you are going to keep talking to people like me from a table like where you are sitting, and that would be a shame.”

DISCUSSION

Under rule 4.413(a), courts “must determine whether the defendant is eligible for probation. In most cases, the defendant is presumptively eligible for probation; in some cases, the defendant is presumptively ineligible; and in some cases, probation is not allowed.” Here, defendant’s two felony convictions made him presumptively ineligible for probation (§ 1203, subd. (e)(4)), triggering rule 4.413(b), which states: “If the defendant comes under a statutory provision prohibiting probation ‘except in unusual cases where the interests of justice would best be served,’ . . . the court should apply the criteria in (c) to evaluate whether the statutory limitation on probation is overcome.”³

In stating that he was “ineligible for probation in the case in chief,” defendant contends the trial court did not understand it had authority to place him on probation, so his sentence must be reversed and the matter remanded for a new sentencing hearing.

³ Rule 4.413(c) contains a nonexhaustive list of factors that may indicate the existence of an unusual case in which probation may be granted. One such factor provides that the “crime was committed because of a mental condition not amounting to a defense, and there is a high likelihood that the defendant would respond favorably to mental health care and treatment that would be required as a condition of probation.” (Rule 4.413(c)(2)(B).) “Alcoholism or drug addiction may be regarded as a ‘mental or physical condition’; but a separate finding that the condition significantly reduced culpability or partially excused the conduct must be made.” (*People v. Reyes* (1987) 195 Cal.App.3d 957, 963.)

The People disagree, arguing that because the record establishes that the judge read the probation report, it is reasonable to infer both that the judge understood defendant was only *presumptively* ineligible for probation, *and* that there is no reasonable probability that the judge would have departed from the probation officer's recommendation because there "are no facts to support the conclusion that this is an unusual case."

"[W]hen . . . the sentencing court bases its determination to deny probation in significant part upon an erroneous impression of the defendant's legal status, fundamental fairness requires that the defendant be afforded a new hearing and 'an informed, intelligent and just decision' on the basis of the facts." (*People v. Ruiz* (1975) 14 Cal.3d 163, 168 [remand required where trial court erroneously believed defendant was presumptively ineligible for probation], italics omitted; *People v. Alvarez* (2002) 95 Cal.App.4th 403, 408-409 [same].)

Here, although the probation report correctly stated the law, neither the trial court, nor the probation department, evaluated whether this was (or was not) an "unusual case" within the meaning of section 1203, rule 4.413(c), or any other standard.⁴ When coupled with the court's categorical statement that defendant was "ineligible for probation," we conclude from the record that the trial court was under the misimpression that it lacked discretion to reimpose probation. Compounding matters, defendant's trial counsel failed to object to the trial court's statement regarding his eligibility for probation, forfeiting the contention on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 353 ["the waiver doctrine should apply to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices"].)

⁴ Rule 4.408(a) provides that the "listing of factors in these rules for making discretionary sentencing decisions is not exhaustive and does not prohibit a trial judge from using additional criteria reasonably related to the decision being made."

Anticipating the forfeiture, defendant argues trial counsel's failure to object constituted ineffective assistance of counsel. " 'To establish ineffective assistance of counsel, a petitioner must demonstrate that (1) counsel's representation was deficient in falling below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient representation subjected the petitioner to prejudice, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the petitioner. [Citations.] 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.]' [Citation.]" (*In re Jones* (1996) 13 Cal.4th 552, 561.)

People v. Scott, supra, 9 Cal.4th 331, describes the standard of care for defense attorneys at sentencing: "Under existing law, a defense attorney who fails to adequately understand the available sentencing alternatives, promote their proper application, or pursue the most advantageous disposition for his client may be found incompetent. [Citations.]" (*Id.* at p. 351.)

We can think of no reason, strategic or otherwise, for trial counsel's failure to object to the court's probation ineligibility statement, or for counsel's failure to argue that this was an "unusual case" and advocate for probation conditioned on defendant's enrollment in a drug rehabilitation program, particularly in light of defendant's known substance abuse problems and the trial court's remarks about defendant's likeability and capacity to make a legitimate living if he got clean of methamphetamine. (See *People v. Cotton* (1991) 230 Cal.App.3d 1072, 1086 ["counsel failed to render effective assistance by failing to assist appellant in gaining admittance into a drug rehabilitation program, and not contacting the probation department to urge it to recommend reinstating probation pursuant to appellant's enrollment in a drug rehabilitation program"].)

Prejudice to defendant resulting from counsel's conduct is a closer question. As noted, a judge must find unusual circumstances before sentencing a twice-convicted felon to probation. (§ 1203, subd. (e)(4); Rule 4.413(c)(2).) The People observe that the trial

court stated it had read the probation report, which noted defendant's lengthy criminal record and limited eligibility for probation, and followed many of its recommendations, ultimately imposing the upper term sentence. Defendant, on the other hand, claims that the trial court's statement to him after sentencing supports an unusual circumstance, i.e., amenability to treatment for his drug addiction, that would support probation.

On balance, the record in this matter—trial counsel's conduct, coupled with the court's ineligibility statement and the absence of an unusual circumstances evaluation—undermines our confidence in the outcome of the sentencing hearing. We conclude that had counsel objected to the trial court's statement, taken steps to gain appellant's admittance into an appropriate residential drug treatment program, and advocated for probation, there is a reasonable probability that defendant would have received a more favorable result at sentencing. We therefore will vacate the sentence and remand the matter for resentencing.

DISPOSITION

The sentence is vacated and the matter is remanded for resentencing. The trial court is directed to prepare an amended abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

_____KRAUSE_____, J.

We concur:

_____BUTZ_____, Acting P. J.

_____HOCH_____, J.